11

Judicial Accountability of Financial Assistance in the Case of Eurozone Debtor Countries

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11.1 INTRODUCTION

This chapter investigates legal accountability of financial assistance from the perspective of borrower countries. It adopts an empirical approach taking the Portuguese case to test how accountability of the financial assistance programme, on the one hand, and of the national measures implementing conditionality, on the other, was exercised. The investigation focuses on the judicial review of austerity measures in different institutional contexts comprising the domestic constitutional court, the Court of Justice of the European Union (CJEU), and the European Court of Human Rights. It aims at assessing how far these judicial fora have delivered the accountability goods identified in the introductory chapter, particularly publicness, as the good oriented towards ensuring that public action is guided by common goods, namely that it respects the constitutional principles of equality and proportionality. These yardsticks have been specifically contemplated by the case law of the Portuguese Constitutional Court and the European Court of Human Rights.

It focuses specifically on the role of the CJEU as an accountability-rendering forum for the financial assistance programmes developed in the framework of the Eurozone crisis. On the other hand, it focuses on how far domestic constitutional adjudication can be an effective accountability tool as it was enforced to control the compatibility of economic conditionality with constitutional

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yardsticks, particularly the protection of salaries and pensions, as well as general principles, such as equality in the allocation of the adjustment costs and the protection of legitimate expectations. The role of the Portuguese *Tribunal Constitucional* (PCC) as a forum for the legal accountability of austerity measures is explored in detail. The limited role of the European Court of Human Rights (ECtHR) is also addressed.

The chapter is organized into four sections, following this introduction (Section 11.1). Section 11.2 briefly outlines the normative developments of financial assistance mechanisms in the Eurozone following the Treaty of Lisbon, and the architecture of the financial assistance programme to Portugal, as well as its complex and disputed legal nature. Section 11.3 deals with the absence of judicial review of the Portuguese MoU, at both the EU and the domestic levels, and the factors that explain why such an important European Monetary Union (EMU) governance mechanism escaped judicial scrutiny. This section also identifies a prominent gap in EU case law which has only been partly addressed as late as of May 2022: the topic of knowing whether financial assistance to euro area members comes under the purview of EU law. The factors contributing to the immunization of the MoU from domestic judicial review are also explored, particularly the 'nationalization of the crisis' by the case law of the Constitutional Court. Section 11.4 deals with judicial review of national measures implementing MoU conditionality. It provides an in-depth analysis of *Associação Sindical dos Juízes* and its problematic consequences for the furtherance of inequalities between immobile public workers and the displacement of social rights and solidarity conflicts from the Luxembourg stage. At the level of domestic constitutional law, it portrays the PCC as the only judicial stage available for the accountability of financial assistance conditionality. Section 11.5 concludes and hypothesizes that more lines of tension between domestic and EU constitutionalism may emerge in the constellations related to solidarity and welfare rights.

11.2 THE ARCHITECTURE OF THE PORTUGUESE FINANCIAL ASSISTANCE PROGRAMME OF 2011

11.2.1 *Financial Assistance in the Eurozone*

The first signs of the euro area sovereign debt crisis surfaced just a few weeks after the Treaty of Lisbon entered into force. The revised EU legal framework left almost untouched the EMU, with the exception of the new Article 136 TFEU. The urgent need to equip the EU and particularly the EMU with

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tools to deal with a major financial crisis was overlooked.[1] There was no instrument to regulate emergency assistance to Eurozone Member States facing financial distress as the predominant paradigm affirmed that each country was fully responsible for its financial (mis)fortunes.[2]

In 2010, the first emergency mechanisms were created: the European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF), the former being a 'creature of EU law',[3] established under Article 122(2) TFEU.[4] Portugal received a total of €24.3 billion from the EFSM.

Besides establishing a financial assistance mechanism applicable to all Member States; a Special Purpose Vehicle was also adopted. The European Financial Stability Facility was incorporated in Luxembourg on 7 June 2010 as a *société anonyme*, and its shareholders are the euro area Member States.[5] The EFSF has provided financial assistance to Ireland, Portugal, and Greece. It was set up as a temporary mechanism, and it does not provide further financial assistance as this task is now assigned to the European Stability Mechanism.[6]

Financial assistance under any of the mechanisms would be subject to strict conditionality: 'financial support should be contingent upon the recipient Member State fulfilling certain budgetary, financial sector, and

[1] Ruffert, 'The European Debt Crisis and European Union Law', 48 *Common Market Law Review* (2011) 1777–1806 at 1778.

[2] The only possibility of financial assistance in the framework of the EU concerned the Balance of Payments assistance, which may be granted by the EU to non-eurozone Member States under Article 143 Treaty on the Functioning of the European Union (TFEU) and Council Regulation (EC) 332/2002 of 18 February 2002 establishing a facility providing a medium-term financial assistance for Member States' balances of payments [2002] OJ L53/1.

[3] Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?' 10 *European Constitutional Law Review* (2014) 398.

[4] Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilization mechanism [2010] OJ L118/1; See also Council Regulation (EU) 2015/1360 of 4 August 2015 amending Regulation (EU) No 407/2010 establishing a European financial stabilization mechanism [2015] OJ L210/1.

[5] European Financial Stability Facility Framework Agreement (as amended with effect from the Effective Date of the Amendment) between Kingdom of Belgium, Federal Republic of Germany, Republic of Estonia, Ireland, Helenic Republic, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherland, Republic of Austria, Portuguese Republic, Republic of Slovenia, Slovak Republic, Republic of Finland, and European Financial Stability Facility, available at www.esm.europa.eu/content/efsf-framework-agreement (accessed 10 September 2021). (Here after EFSF).

[6] The EFSF was replaced for future assistance programmes in 2012 by the European Stability Mechanism (ESM), which was also established as an international agreement between the Eurozone states.

macroeconomic conditions'.[7] This new mode of economic governance has been qualified as 'authoritarian liberalism' for its resonance with the German experience of the late 1920s and early 1930s.[8]

11.2.2 *The Financial Assistance Programme to Portugal*

In April 2011, Portugal became the third Eurozone country to request financial assistance, following Greece and Ireland. The Portuguese Financial and Economic Assistance Programme (FEAP) comprised a €78 billion loan to be delivered between 2011 and 2014 provided by the International Monetary Fund (IMF), the EU, within the framework of the EFSM, and the Eurozone countries, under the EFSF. The programme incorporated three documents: the Memorandum of Economic and Financial Policies, the Technical Memorandum of Understanding, and the Memorandum on Specific Policy Conditionality (hereinafter, the MoU). The first two documents were sent as attachments to a letter of intent addressed to the IMF's executive Commission, and the third document was signed between the Portuguese Republic and the European Commission. The MoU detailed the general economic policy conditions embedded in Council Implementing Decision 2011/344/EU, of 30 May 2011, on granting EU financial assistance to Portugal.

The FEAP covered three broad lines of action to reach the 3 per cent deficit ceiling in 2013. It provided for the adoption of profound 'structural reforms' and a credible 'fiscal consolidation' strategy. As the government's report on the Adjustment Programme's execution claimed, 'these were the years of the deepest and most wide-reaching reforms in the history of [Portuguese] democracy'.[9]

The language of 'structural reforms' and 'fiscal consolidation' translates strict conditionality as a vital component of the bailout agreement. As Ioannidis notes, '[c]onditionality is the new topos of EU economic governance'.[10] To eliminate the danger of moral hazard, it 'became the basic disciplining instrument'.[11]

[7] Case C-370/12 *Thomas Pringle v Government of Ireland*, ECLI:EU:C:2012:756.

[8] Wilkinson, 'The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union', 14 *German Law Journal* (2013) 527–560; Dani, 'The EU Transformation of the Social State', in Ferri and Cortese (eds.), *The EU Social Market Economy and the Law* (Routledge, 2018) 39.

[9] Governo de Portugal, Secretary of State to the Prime Minister, 'Managing the Adjustment Programme–2011|2014', available at www.historico.portugal.gov.pt/media/1505374/20140829%20seapm%20gestao%20paef%20ing.pdf.

[10] Ioannidis, 'EU Financial Assistance After Conditionality After "Two Pack"', 74 *Zeitschrift für ausländisches öfentliches Recht und Völkerrecht* (2014) 62.

[11] Ioannidis, 'Europe's New Transformations: How the EU Economic Constitution Changed During the Eurozone Crisis', 53 *Common Market Law Review* (2016) 1240.

The bailout was negotiated between April and May 2011 by the Portuguese State with a Troika composed of the IMF, the European Central Bank, and the European Commission. The negotiations were held by a resigning government, and the EU and Eurogroup required the commitment of the main opposition parties to the MoU to ensure political consensus.[12]

11.2.3 *The Legal Nature of the FEAP*

The legal character of the memoranda and their conditionality has been a disputed topic. Some scholars claim that the programme had a pure proclamatory nature at the domestic level, while others argue that they are international treaties.[13] Others still recognize the hybrid nature of the programme, which combined a unilateral act (the IMF's declaration), a bilateral agreement (the framework agreement and the loan contract with the EFSF), and EU acts (on the EFSM).[14] Another strand of scholarly literature claims that, despite the mixed legal parentage of the programme, and the links with the EU legal order, the predominant pedigree relates to instruments which must be qualified as international agreements.[15]

That is not the opinion shared by Claire Kilpatrick who noted that, in the Portuguese and Irish bailouts, the 'European leg' of the memoranda prevailed as the 'pole normative position' was assigned to the 'EU sources containing the loan conditionality…, not the international sources'.[16]

[12] As noted by Pereira Coutinho, this requirement was clearly expressed in the joint declaration of 8 April 2011, stating that negotiations shall include all the opposition parties who, moreover, should confirm a new government in Parliament with the ability to fully adopt and implement the MoU. Since this declaration was made less than two months before parliamentary elections, the author argues that it can be regarded as an unlawful interference in the domestic affairs of the Portuguese State forbidden by both international law [Article 2(7) of the United Nations Charter] and EU law [Article 4(2) Treaty on European Union (Hereafter TEU)]. See Pereira Coutinho, 'Austerity on the loose in Portugal: European judicial restraint in times of crisis', 8(3) *Perspectives on Federalism* (2016) 127–128.

[13] Baptista, 'Natureza jurídica dos memorandos com o FMI e a União Europeia', 71(2) *Revista da Ordem dos Advogados* (2011) 483; Caldas and Oliveira 'A vinculatividade do Memorando de Entendimento da Troika – Em especial a disciplina orçamental', 4(4) *Revista de Direito Público e Finanças* (2011) 173–176.

[14] Pereira Coutinho, 'A natureza jurídica dos memorandos da "Troika" ano XIII', 24/25 *Themis* (2013) 147–179; Anastasia Polou, 'Financial Conditionality and Human Rights Protection: What Is the Role of the EU Charter of Fundamental Rights?', 54 *Common Market Law Review* (2017) 1002.

[15] Cisotta and Gallo, 'The Portuguese Constitutional Court Case-Law on Austerity Measures: A Reappraisal', in Kilpatrick and De Witte (eds.), *Social Rights in Crisis in the Eurozone: The Role of Fundamental Rights Challenges*, EUI WP 2014/5 85.

[16] Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?', 10 *European Constitutional Law Review* (2014) 401.

Similarly, the PCC affirmed, in the first opportunity in which it was confronted with austerity policies implementing MoU conditionality, that the memoranda were legally binding. Whereas the Greek Council of State ruled out the legal value of the Greek MoU and sought to recognize its role as a political and economic plan whose implementation claimed the adoption of primary or secondary legal instruments,[17] the PCC recognized the 'binding force for the Portuguese State' of the FEAP, since it combined instruments based on both international law and EU law according to Article 8(2) of the Constitution. The international law leg was based on Article V, Section 11.3 of the IMF Agreement, whereas the EU leg was located on Article 122(2) TFEU and Council Regulation (EU) No 407/2010 of 11 May establishing the EFSM. In the words of the Court, 'These documents impose the adoption by the Portuguese State of the measures contained therein as a condition for the phased compliance with the financing contracts signed between the same entities.'[18]

11.3 JUDICIAL REVIEW OF THE MoU

According to Fabbrini, the intergovernmental method of governance that dominated the EMU during the Eurozone crisis led to high degree of judicial intervention by both domestic and EU courts.[19] This phenomenon can be framed as the *paradox of judicialization* in contrast to the deferential posture adopted by the US courts in economic issues. In relation to the Portuguese financial assistance programme, domestic courts were very active in the adjudication of EMU affairs. However, that does not hold true for the CJEU, which refrained from intervening in the disputes that emerged in the context of the financial assistance to Portugal.

The Portuguese MoU has never been tested in court due to what has been called a 'systemic failure in the jurisdictional system of the EU'.[20] For different reasons, the MoU escaped review by both the CJEU (1) and the PCC (2). This section reviews the circumstances underlying the immunization from judicial accountability of this important instrument of Eurocrisis governance.

[17] Markakis, *Accountability in the Economic and Monetary Union. Foundations, Policy and Governance* (OUP, 2020) 261–262.

[18] Decision 353/2012.

[19] Fabbrini, *Economic Governance in Europe. Comparative Paradoxes and Constitutional Changes* (OUP, 2016) 63 ff.

[20] Pereira Coutinho, 'The Portuguese Bailout, Social Rights and the Rule of Law', in Coli, Pacini, and Stradella (eds.), *Policy, Welfare and Financial Resources: The Impact of the Crisis on Territories* (Pisa University Press, 2017).

11.3.1 *EU Case Law*

Two preliminary references by Portuguese courts indirectly challenged the validity of the MoU before the CJEU but in both cases the Court held that it clearly had no jurisdiction to hear them. Previously, another preliminary reference had challenged budgetary provisions implementing austerity measures adopted in the context of an excessive deficit procedure initiated by Council Decision No 2010/288/EU of 19 January 2010.[21] The wording of the three references challenged only national law implementing pay cuts on public-sector companies and failed to establish that the impugned domestic budgetary provisions implemented EU law.[22] Significantly, the CJEU treated all three cases as analogous in spite of the different legal frameworks underlying the concerned austerity measures. Furthermore, both the *Fidelidade Mundial* and *Via Direta* cases concern Article 21(1) of the Budget Law for 2012 on the suspension of payment of holiday and Christmas bonuses or similar benefits, whose wording expressly referred to the financial assistance programme:

> For the duration of the Economic and Financial Assistance Programme (PAEF), as an exceptional measure of budgetary stability, the payment of holiday and Christmas bonuses … or any benefits relating to the 13th and/or 14th month pay to those persons referred to in Article 19(9) of [the 2011 Budget Law], as amended by Law No 48/2011 of 26 August 2011 and Law No 60-A/2011 of 30 November 2011, whose monthly remuneration is greater than EUR 1.100, shall be suspended.

The CJEU was outwardly dismissive of its jurisdiction to hear the cases alluding to the referring courts' failure to establish the link with the EU bailout terms with sufficient clarity. The poor drafting of the references can be attributed to the complexity underlying the foundational bailout and its subsequent updates.[23] However, that should have not prevented the CJEU from redrafting the questions submitted by the Portuguese courts.[24] In cases of issues of admissibility, the CJEU has developed a generous understanding according to which questions

[21] Case C-128/12 *Sindicato dos Bancários do Norte, Sindicato dos Bancários do Centro, Sindicato dos Bancários do Sul e Ilhas, Luís Miguel Rodrigues v BPN – Banco Português de Negócios SA* ECLI:EU:C:2013:149.

[22] Case C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial – Companhia de Seguros SA* ECLI:EU:C:2014:2036; Case C-665/13 *Sindicato Nacional dos Profissionais dos Seguros e Afins v Via Direta – Companhia de Seguros SA* ECLI:EU:C:2014:2327.

[23] Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts', 35(2) *Oxford Journal of Legal Studies* (2015) 325–353.

[24] Ibid Kilpatrick 349, at fn. 107 specifically; Pereira Coutinho *supra* n 20 at 81; Polou, 'Financial Assistance Conditionality and Human Rights Protection', 54 *Common Market Law Review*

submitted by national courts enjoy a 'presumption of relevance'. Questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance.[25] Only in exceptional circumstances will the Court refrain from giving a preliminary ruling providing that there is a rebuttal to the presumption.[26]

In *Escribano Vindel*,[27] a case concerning reduction in salary of a Catalonian judge, in the context of general pay cuts linked to the requirements of eliminating an excessive budget deficit, the presumption of relevance was crucial for the Court to accept jurisdiction. In this case, the only link to EU law consisted of the reiterated reference to the 'requirements of eliminating an excessive budget deficit', without any specification being put forward of the normative framework detailing the EU sources potentially involved. The contrast in the attitude of the Court of Justice between the references from the Portuguese courts and *Escribano Vindel* is startling.

The fact that the Court failed to apply the presumption of relevance might imply, as Markakis hypothesizes, that it did not regard the contested bailout measures as resulting from an EU law obligation.[28] According to this line of reasoning, the bailout terms embodied conditionality the national authorities would have to implement to access the disbursement of funds but were not legally binding. Insofar as said conditions concern areas of national competence, they would be mere recommendations. Accordingly, the EU has secondary competence to set the terms on which the financial assistance can be provided,[29] but the relevant Council decisions would not give rise to EU law obligations to transpose and implement the bailout conditions into domestic law. However, the CJEU did not come clean on this and was limited to stating that the decisions for reference did not contain any specific material showing that the national measures were intended to implement EU law.[30] Moreover,

(2017) 991–1026, at 1017–1018; Markakis, *Accountability in the Economic and Monetary Union supra* n 17 at 220 and fn. 79; Farahat, *Transnationale Solidaritätskonflite: Eine vergleichende Analyse verfassungsgerichlicher Konfliktbearbeitung in der Eurokrise* (Mohr Siebeck, 2021).

[25] Case C-64/16 *Associação Sindical dos Juízes Portugueses*, Opinion of Advocate General Saugmandsgaard Øe ECLI:EU:C:2017:395 para. 28.

[26] Case C-300/01 *Doris Salzmann* ECLI:EU:C:2003:283 para 29–33.

[27] Case C-49/18 *Carlos Escribano Vindel* ECLI:EU:C:2019:106 para. 24–26.

[28] Markakis, *Accountability in the Economic and Monetary Union supra* n 17 at 220–224.

[29] Article 122(2) TFEU, which provided the legal basis for the EFSM, and not Article 136(3) TFEU, as the founding basis for the ESM.

[30] Similarly, other references concerning austerity measures from countries on financial assistance were not dealt with in substance by the CJEU. See the Romanian cases: ECJ 14 December 2011, Case C-434/11 *Corpul Naţional al Poliţiştilor v Ministerul Administraţiei şi Internelor*

in later case law, as we will see below, the CJEU would eventually acknowledge that the bailout conditions form part of EU law and the Member State concerned is 'implementing Union law' within the meaning of Article 51(1) of the CFEU, at least when financial assistance is granted by the EFSM.[31]

11.3.2 *Ledra and Florescu*

In the following years, the Court delivered other important judgements in different settings of financial assistance that would retrospectively point to the flaws in its initial case law to decline jurisdiction in the framework of the Portuguese financial assistance programme. A first moment came when, in *Ledra*, relating to the Cyprus bailout,[32] despite rejecting the qualification of the bailout as an act of EU law act, the Court nevertheless added that EU institutions remain fully bound by EU law and the Charter when they act as agents of a distinct international organization such as the ESM.

Afterwards, in *Florescu*,[33] the Court acknowledged that a Memorandum of Understanding for Balance of payments is an act of an EU institution and could thus be referred under Article 267 TFEU for interpretation. The Court also specified that the national measure implementing MoU and a Council decision conditionality constituted an implementation of EU law and thus triggered the application of the Charter of Fundamental Rights. It has been argued that the '*Florescu* ruling serves to enhance the legal accountability of the EU institutions for their actions with respect to bailouts'.[34] However, *Florescu* related to a bailout adopted in the framework of Article 143 TFEU concerning assistance to non-euro area Member States experiencing difficulties with respect to their balance of payments. For accountability purposes, the field of financial assistance to euro area members still posed as a gap in the case law of the Court of Justice.

This gap has only partly been addressed in more recent case law of the CJEU, and in terms which raise problematic issues. This will be further addressed below.

(MAI) and Others; ECLI:EU:C:2011:830; Case C-134/12 *Corpul Naţional al Poliţiştilor – Biroul Executiv Central (în numele şi în interesul membrilor săi – funcţionari publici cu statut special – poliţişti din cadrul IPJ Tulcea) v Ministerul Administraţiei şi Internelor and Others* ECLI:EU:C:2012:288; Case C-369/12 *Corpul Naţional al Poliţiştilor – Biroul Executiv Central v Ministerului Administraţiei şi Internelo and Others* ELCI:EU:C:2012:725.

[31] See *BPC Lux 2* below.

[32] See *supra* note 25.

[33] Case C-258/14 *Florescu and Others* ECLI:EU:C:2017:448.

[34] Markakis and Dermine, 'Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: Florescu', 55 *Common Market Law Review* (2018) 643.

11.3.3 *Constitutional Court Case Law*

As explained above, the PTC qualified the documents that integrated the financial assistance programme as legally binding and found that the MoU was 'ultimately based on Article 122(2)' TFEU, and qualified, therefore as EU law. As such, insofar as the founding documents imposed the adoption, by the Portuguese State, of conditionality, there was no discretion as to whether the domestic authorities were in fact obliged to implement the said conditions. However, the Court found that those measures afforded discretion to the State to decide on the means best able to ensure compliance with those commitments.

In Decision 353/2012, however, the judges failed to realize that the impugned measures – the total and partial suspension of the 13th and 14th monthly salary payments of public workers and pensioners – albeit absent from the initial version of the MoU, had been included in its second update. In fact, whereas the first disbursement of financial assistance is released after the signature of the MoU, further instalments are conditional on the fulfilment of the bailout conditions included in the MoU (Article 4 of Regulation (EU) 407/2010). Changes in the general economic policy conditionality are negotiated between the Commission and the beneficiary Member State. Afterwards, the Council, acting by a qualified majority on a proposal from the Commission, approves the revised adjustment programme prepared by the Member State. The disbursement of the next instalment of the loan follows the signature by the Commission and the Member State of an updated version of the MoU revised in accordance with the Council's decision (Article 3(6) and (7) of Regulation 407/2010).

The complex framework underlying the financial assistance programme added to the difficulty of the Court in handling claims involving the adjudication of complex economic issues in times of economic crisis.[35] Importantly, by failing to trace the link between the domestic impugned measures and the MoU, a document which had been qualified by the PCC as EU law, the stage was set for what would become a dominant trend of the extensive bulk of austerity case law: the 'nationalization of the crisis'[36] whereby the PTC depicted domestic measures implementing the bailout conditionality as purely domestic affairs.

[35] See generally Ginsburg, Rosen and Vanberg (eds.), *Constitutions in Times of Financial Crisis* (CUP, 2019).

[36] Violante and André, 'The Constitutional Performance of Austerity in Portugal', in Ginsburg, Rosen and Vanberg (eds.), *Constitutions in Times of Financial Crisis* (CUP, 2019) 254–255; Violante, 'Constitutional Adjudication as a Forum for Contesting Austerity: The Case of

The challenged austerity measures were always framed as the result of autonomous political choices between competing viable alternatives, which allowed the Court to circumvent the difficult questions concerning the relationship between EU law and the national constitution and the validity of the MoU. This nationalization strategy of the crisis immunized the austerity litigation from the reach of EU law. Had the Court acknowledged that at least some of the challenged measures were – textually – determined by the MoU, then it should have drafted a preliminary reference questioning its compatibility with EU law, namely the Charter. Such a reference[37] would be harder to dismiss by the CJEU and would have brought the challenged measures to 'their natural stage' in accordance with the transnational dimension of austerity conflicts.[38] Furthermore, it could have pushed the CJEU to face the solidarity conflicts undergirding the bailout austerity and measure the austerity against the social provisions of the CFEU. This leg of substantive accountability in relation to the public goods of social provisions of the Charter is missing not only in relation to the Portuguese financial assistance programme but generally in relation to the tension underlying social and liberal Europe.

It should be noted, however, that the nationalization of the austerity conflicts on the part of the PCC is in line with its traditional case law that had a reluctance to engage with EU law. Like other Kelsenian constitutional courts, the PCC followed the 'doctrine of isolationism'[39] for a long time, separating EU law issues from the stage of constitutional adjudication.[40] Only recently has the PCC meaningfully engaged with EU law in its decisions.[41]

Portugal', in Farahat and Arzoz (eds.), *Contesting Austerity. A Socio-Legal Inquiry* (Hart, 2021). On the nationalization of transnational solidarity conflicts by domestic constitutional courts see the chapter by Farahat in this volume, 'Adjudicating Transnational Solidarity Conflicts: Can Courts Ban the Destructive Potential'.

37 I have written on the reasons that may justify this isolationist posture of the PTC. See Violante, 'Constitutional Adjudication as a Forum for Contesting Austerity: The Case of Portugal' *supra* n. 36 183–184.

38 According to Farahat, the Eurocrisis brought about new solidarity conflicts between different political and social groups both within the Member States and between the Members States and across the border, between social groups, as interconnected conflicts. See Farahat, *Transnationale Solidaritätskonflikte. Eine vergleichende Analyse verfassungesgerichtlicher Konflikbearbeitung in der Eurokrise* (Mohr Siebeck, 2021).

39 Kustra-Rogatka, 'The Kelsenian Model of Constitutional Review in Times of European Integration – Reconsidering the Basic Features', 19 *International and Comparative Law Review* (2019) 14.

40 See further Violante, 'Constitutional Adjudication as a Forum for Contesting Austerity: The Case of Portugal', *supra* n. 36 185–186.

41 In decision 422/2020, but, in particularly, in May 2022, in Decision 382/2022. For a commentary on the latter, including its importance for the interaction between domestic constitutional law and EU law, see Violante, 'How the Data Retention Legislation Led to a

11.4 JUDICIAL REVIEW OF NATIONAL MEASURES IMPLEMENTING MOU CONDITIONALITY

Conditionality agreed at the level of financial assistance programmes needs to be implemented at the national level. In the sense that it is entrenched in legislation enacted in the scope of EU law, it can be challenged at the EU level, and measured against EU law standards, including the CFREU (11.4.1). However, national measures implementing conditionality can also be subject to national accountability instruments, namely review by domestic courts. In the case of the Portuguese financial assistance programme, the PCC played a pivotal role in reviewing the compatibility of several austerity measures implementing bailout conditionality (11.4.2). When domestic courts failed to provide adequate relief, litigants also turned to international courts (11.4.3).

11.4.1 *EU Case Law*

11.4.1.1 Associação Sindical dos Juízes Portugueses[42]

As mentioned earlier, after the initial CJEU case law in relation to the Portuguese bailout, declining jurisdiction to review national measures implementing the EU bailout, and the doctrine established in *Ledra* and *Florescu*, there was a gap in the jurisprudence of the Court, concerning the field of financial assistance to euro area Member States. In *Associação Sindical dos Juízes*, the Court of Justice was finally faced with the opportunity to address this gap and confirm or reject the thesis that there was a link between domestic conditionality measures also in the context of the Eurozone and EU law.

In this case, the CJEU dealt with a reference from a Portuguese court on pay cuts that also affected judges and were adopted in the context of the excessive deficit procedure and the financial assistance programme to Portugal. Both the referring court and Advocate General H. Saugmandsgaard Øe qualified the national measure at stake as implementing EU law in the sense of Article 51 of the Charter.[43]

The case was raised in the framework of a strategic litigation plan developed by the Association of Portuguese Judges, as the complainant, in representation of

National Constitutional Crisis in Portugal', *Verfassungsblog*, 9 Juni 2022, available at https://verfassungsblog.de/how-the-data-retention-legislation-led-to-a-national-constitutional-crisis-in-portugal/ (last accessed 20 June 2022).

[42] Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117.

[43] Opinion of Advocate General H. Saugmandsgaard Øe, C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2017:395 paras 43–53.

judges from the Court of Auditors.[44] The Association of Portuguese Judges had argued that the reductions in salaries breached the principle of judicial independence, in its double dimension of a constitutional and EU law yardstick. The judicial independence claim was raised following the Constitutional Court's assessment of the reductions in salaries that will be analysed in more detail below. The Constitutional Court's review had considered the principles of legitimate expectations and equality but not the principle of judicial independence, which justified a new wave of litigation prompted by the Association of Judges.

On a first case,[45] the Supreme Administrative Court refused to refer the dispute to the CJEU, on the basis that it did not involve EU law. To substantiate its reasoning, the Supreme Administrative Court referred to the Court of Justice's earlier case law that had declined jurisdiction to rule on preliminary references from Portuguese courts on cases concerning pay cuts adopted in the context of the assistance programme.[46] This judgment was adopted in full chambers. Three judges, however, dissented in the issue concerning the preliminary reference, in a vote drafted by Judge Medeiros de Carvalho.[47] The dissent reasoning noted, on the one hand, that the financial adjustment measures could also be construed as EU law, and, on the other, that a problem of judicial independence might also be framed under Articles 19(1) TEU and 47 of the CFEU.

The Association of Portuguese Judges was encouraged by these three dissenting votes – restricted to the issue of the preliminary reference to the Court of Justice – to pursue its litigation strategy. As it raised further challenges to the pay cuts, one of them was eventually allocated to one of the judges that had expressed his dissent on the preliminary reference issue, Judge Araújo Veloso.[48] The Association of Judges joined a legal opinion[49] authored by two EU law professors to substantiate the claim that a preliminary reference should be drafted, and the case taken to Luxembourg. This legal opinion analysed the relevance of a reference and the terms in which a question should be addressed to the Court of Justice. The wording of the question was provided

[44] By questioning the reductions in salaries of judges from the Court of Auditors, the Association of Judges was able to trigger the direct jurisdiction of the Supreme Administrative Court, which is the highest instance in the administrative order.

[45] Judgment of 15 October 2015, *Supremo Tribunal Administrativo*, Processo n.º 0438/14.

[46] The Court referred specifically to Case C-128/18 *Dumitru-Tudor Dorobant* EU:C:2019:857.

[47] The other two dissenting judges were Madeira dos Santos and Araújo Veloso. The latter would be the rapporteur and drafter of the preliminary reference that originated the famous ECJ case *Associação Sindical dos Juízes Portugueses*.

[48] Judgment of 20 June 2018, *Supremo Tribunal Administrativo*, Processo n.º 067/15.

[49] Silveira, Froufe, 'Parecer', in Silveira, Froufe et al., 'União de direito para além do Direito da União – As garantias de independência judicial no Acórdão Associação Sindical dos Juízes', *Julgar Online* (2018), maio, 1–46, 12–28.

and later adopted by the Supreme Administrative Court in the reference.[50] It also addressed the substance of the dispute to conclude that the pay cuts breached the principle of judicial independence enshrined in Articles 19(1), TEU, second subparagraph, and 47 CFREU.

In his opinion, Advocate General H. Saugmandsgaard Øe concluded that the principle of judicial independence, as enshrined on Article 47 CFREU, did not preclude the general salary-reduction measures adopted by Portuguese authorities to eliminate an excessive budget deficit from being applied to the members of the Portuguese Court of Auditors. He also argued that the dispute before the referring court did not involve judicial independence as such.[51]

The CJEU did not address the compatibility of judicial pay cuts with the Charter, following the case law established in *Ledra* that financial assistance MoUs entered into by EU institutions triggered the application of the Charter. Instead, in a ruling that has been qualified as 'groundbreaking', 'surprising',[52] and 'the most important judgment since *Les Verts* as regards the meaning and scope of the principle of the rule of law in the EU legal system',[53] the CJEU claimed jurisdiction on the basis of Article 19(1), TEU, second subparagraph, focusing on the role of national courts within the European judiciary and thus triggering the threshold of the requirements essential to effective judicial protection. Following a very creative line reasoning, the CJEU 'shifted the focus from the economic crisis (or Eurocrisis) to the "rule of law crisis"'.[54]

Regarding the pay cuts, the Court concluded that since the impugned measures applied to several groups of civil servants, were temporary, and aimed at the reduction of the country's excessive budget deficit, they did not impair judicial independence.

[50] This case provides a peculiar example of academic 'Euro-lawyering', a phenomenon Tommaso Pavone has described as the action of lawyers in their own countries pushing for institutional change near the domestic courts and mobilizing the courts against their own governments. They often construct 'test cases' and 'ghostwr[i]te the referrals to the ECJ that judges [a]re unable or reluctant to write themselves, supplying the European Court with opportunities to deliver pathbreaking judgments'. See Pavone, *The Ghostwriters. Lawyers and the Politics behind the Judicial Construction of Europe* (Cambridge University Press, 2022) 14–15.

[51] Pech and Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice – A Casebook Overview of Key Judgments since the Portuguese Judges Case', Report n. 3, Swedish Institute for European Policy Studies, September 2021. Accessed via www.sieps.de (last accessed 30 March 2022), p. 24.

[52] Bonelli and Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary. ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses', 14 *European Constitutional Law Review* (2018) 622.

[53] Pech and Platon, 'Judicial Independence Under Threat: The Court of Justice to the Rescue in the ASJP Case', 55 *Common Market Law Review* (2018) 1827.

[54] Bonelli and Claes, 'Judicial Serendipity… ' *supra* n. 53 at 623.

From the Eurocrisis perspective, particularly in the framework of the Portuguese financial assistance programme, *Associação Sindical dos Juízes Portugueses* was a disappointing ruling.[55] After having kept its doors shut to previous references concerning austerity measures adopted in the framework of the financial assistance programme, the CJEU had finally agreed to take jurisdiction on this case. Still, it maintained absolute silence as to the relationship between austerity measures and EU law and transformed an economic crisis dispute into a rule of law case. By doing so, it confirmed that the only judicial accountability forum fully available to contest financial assistance conditionality was found at the domestic level.

In fact, although the Court accepted to review the validity of the pay cuts in *Associação Sindical dos Juízes Portugueses*, its jurisdiction was determined by the universe of the workers affected by the cuts – judges from the Court of Auditors. The Court of Auditors holds jurisdiction for cases concerning EU own resources and the use of financial resources. Therefore, in the Court's view, its judges must enjoy a sufficient level of independence required under Article 19(1) TEU. The applicability of Article 47 CFEU was excluded.

The jurisdiction of the Court of Justice to review pay cuts in the context of Eurozone austerity was limited to pay cuts applicable to judges,[56] which excluded all the slashes to wages and income endured by the remaining public workers. On a first moment, the distinction could seem irrelevant since magistrates in general were subject to the same pay cuts applicable to public workers in general. However, the scrutiny of the CJEU was narrowed by the professional quality of these workers: the reductions in wages were measured solely against the principle of judicial independence as this was the single yardstick mobilized by the Court and that, indeed, triggered its jurisdiction.

The considerable distributive impact of the financial assistance programme at the national level, as well as its encroachment on core human rights provisions of the EU, were therefore overlooked. In fact, contrary to what the CJEU had stated in *Ledra*, where it affirmed the duty of EU institutions to respect the CFREU when formulating financial assistance conditionality, in *Associação Sindical dos Juízes* the Portuguese financial assistance programme does not come under the purview of the Charter and EU human rights. In fact, by adjudicating this case solely on the basis of Article 19(1) TEU, the

[55] Pereira Coutinho, 'Associação Sindical dos Juízes Portugueses: judicial independence and austerity measures at the Court of Justice', 2 *Quaderni costituzionali* (2018) 511.

[56] Judges from the Court of Auditors enjoy the same statute of other judges in accordance with the law.

Court inaugurated a new line of case law as this parameter had 'never served as an autonomous standard for the review of national laws'.[57] The Court distanced itself from the doctrine established in *Florescu* (which, incidentally, also concerned judges' remunerations, in the form of pensioners' rights), where it assumed jurisdiction by considering that MoU qualified as acts of EU institutions and that national implementing measures fell within the scope of Union law. That made the Charter applicable. In *Associação Sindical dos Juízes*, the CJEU dispensed the qualification of the MoU as an act of EU institution and circumvented the Charter's application. The case turned into a system scrutiny of the country's judicial structures and not, as Krajewski argues, a fundamental rights' case.[58]

As the Court partly accepted the structure designed by the Association of Portuguese Judges in its strategy to defend their salaries from austerity measures, and embraced the framing provided by the principle of judicial independence, it inescapably confirmed that its judicial forum is not fit for social conflicts.

11.4.1.2 A New Distinction between Winners and Losers of European Integration

Moreover, *Associação Sindical dos Juízes* created a differentiation between immobile public workers in Portugal: on the one hand, those who come under Strasbourg's umbrella of protection (national judges); on the other hand, all the other public workers, who do not enjoy the extra accountability forum rendered by the principle of judicial independence as a trigger for the CJEU's jurisdiction to review pay cuts implemented in the framework of a financial assistance programme (which the Court had, until very recently, systematically denied the quality of Union law). Such differentiation brings to the fore a new cleavage in European and national citizenship: whereas the fault line between mobile and immobile Europeans, or between the movers (the 'Eurostars'[59]) and the stayers, had already been pinpointed in the literature,[60] a new divide emerges between national immobile citizens. On the one hand, those that

[57] Krajewski, 'Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's Dilemma', 3(1) *European Papers* (2018) 402.

[58] Ibid.

[59] Favell, *Eurostars and Eurocities: Free Movement and Mobility in an Integrating Europe*, (Blackwell, 2008).

[60] Bauböck, 'The New Cleavagge between Mobile and Immobile Europeans', in Bauböck (ed.), *Debating European Citizenship* (Springer, 2019) 125–127; Fligstein, *Euro-Clash – The EU, European Identity, and the Future of Europe* (Oxford University Press, 2008) 211–213; Dani, 'Rehabilitating Social Conflicts in European Public Law', 18 *European Law Journal* (2012) 638.

cannot resort to the protection afforded by EU law, that is, the communities that are treated as 'deserts' of EU law.[61] On the other, domestic judges, who enjoy not only the national level of protection but also the supranational guarantees, including the EU institutional machinery.

11.4.1.3 A Case of Eurocrisis Strategic Litigation Turns into the Rule of Law Crisis Landmark Case

Considering *Associação Sindical dos Juízes Portugueses* under this lens, it also becomes clear that this ruling – the seminal case that inaugurated the rule of law case bulk of the Court of Justice – did not primarily concern the judicial independence of domestic legal structures. Rather, the issue frame presented by the judges' association emerged in a larger context of a litigation strategy against pay cuts in a context of financial retrenchment, where the entire public sector was affected by slashes in wages. The challenge on judicial independence is explained because the National Association of Judges was forced to raise new legal questions that had not been exhausted under previous case law to avoid preliminary dismissal of the merit of its claims near the Supreme Administrative Court. The issue frame – *do pay cuts adopted in a context of financial retrenchment breach the principle of judicial independence?* – was thereby determined by the previous constitutional case law that had accepted temporary cuts as valid under the principles of proportionality and equality. It is a case where the litigant selects an alternative frame over the prevailing one – according to which cuts would be illegal for breach of universal principles – because the latter has already been dismissed in the lower court, or, in this case, by the case law.[62] In fact, as we will see below, the Portuguese Constitutional Court had assessed said measures against the principles of proportionality and equality but not against the principle of judicial independence. There was a 'strong incentive to reframe the issue by offering an alternative dimension, or frame, on which to base the decision',[63] to maximize the chances of reaching a different decisional outcome.

Moreover, the Court of Justice's initial case law had declined jurisdiction to rule on salary-reduction measures adopted in the framework of the bailout. The reluctance of the ECJ in taking jurisdiction in austerity-related cases was

[61] This is an expression used by Pavone to refer to cases where soliciting the Court of Justice is 'either impractical or impossible'. Pavone, 'Putting European Constitutionalism in Place', 16 *European Constitutional Law Review* (2020) 689.

[62] Wedeking, 'Supreme Court Litigants and Strategic Framing', *American Journal of Political Science* (2010) 620.

[63] Ibid., 619.

salient in light of its previous case law. That is why the litigant Association of Judges, and later the referring Supreme Administrative Court, emphasized the link with EU law of the measures enforcing the salary reductions, stressing that the proceedings came within the scope of Article 47 of the Charter since the mandatory requirements for reducing the State's excessive budget deficit were imposed on the Portuguese Government by EU decisions granting, in particular, financial assistance to that Member State. The decisional outcome to base the jurisdiction of the Court solely in Article 19(1) TEU was fully unexpected. As Pech and Kochenov cogently argue,

> [T]he practical, if not far-reaching, consequence of the Court's interpretation in Portuguese Judges is that private parties, in particular judges when acting as plaintiffs, have been empowered to rely upon the second subparagraph of Article 19(1) TEU directly to challenge, in the context of domestic proceedings, national measures which can be considered to undermine the independence of any national court or tribunal which may apply or interpret EU law'.[64]

11.4.1.4 An 'Unforgivable Late Admission': BPC Lux 2[65]

Only in May 2022 has the CJEU come to acknowledge that the financial assistance programme to Portugal entails a link with EU law and finally addressed the mentioned accountability gap in its case law. On its ruling delivered on 5 May 2022, the court found that the Portuguese legal framework for banking resolution that came into force in 2012 was a national measure applying EU law since it represented an implementation of a MoU signed within the framework of Regulation 407/2010 establishing the EFSM. As Martinho Lucas Pires accused, this is an 'unforgivable late admission'[66] from the CJEU.

This conflict concerned the validity of a resolution measure applied by the national authority to a private bank considering the protection of the right to property afforded by Article 17 of the CFEU. To put it bluntly, petitioners claiming breach of their right to property, specifically investment funds, did not

[64] Pech and Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice – A Casebook Overview of Key Judgments since the Portuguese Judges Case', Report n. 3, Swedish Institute for European Policy Studies, September 2021. Accessed via www.sieps.de (last accessed 30 March 2022). The authors claim that this line of case law has been subsequently expressly reiterated in the cases of *Miasto Łowicz and Prokurator Generalny*: Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny* EU:C:2020:234.

[65] Case C-83/20 *BPC Lux 2 Sàrl and Others* EU:C:2022:346.

[66] Lucas Pires, Op-Ed: 'Unforgivable Late Admissions: The Court of Justice Decides on Bank Resolution in *BPC Lux 2 Sàrl* (C-83/20)', *EU Law Live*, 12 May 2022, available at https://eulawlive.com/op-ed-unforgivable-late-admissions-the-court-of-justice-decides-on-bank-resolution-in-bpc-lux-2-sarl-c-83-20-by-martinho-lucas-pires/ (last visited 17 June 2022).

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face an insurmountable barrier to take their case to Luxembourg. On the other hand, workers and pensioners who had seen their wages and pensions subject to cuts and freezes did not enjoy the same opportunity. This is another sign of the inequality between rights-holders enhanced by the case law of the CJEU that I mentioned previously and that points to the accountability gaps at the level of the European judicial stage with regard to financial assistance programmes.

What reasons can account for this 'late admission' of the CJEU? On the surface, one could simply think that the court was coming to terms with its jurisprudential troubled past and making amends with it. After having rejected jurisdiction in the early cases and taking the strategic shift in *Associação Sindical dos Juízes*, *BPC Lux 2* might just represent the closure of a troubled process, and be the appropriate case to build coherence with *Florescu* in which the court had already accepted that bailouts are acts of EU law. There may be something else to the story, however: the problem at stake was too important to be missed by the CJEU. In fact, the main issue of the referred questions concerned the problem of knowing whether the fact that the Portuguese applicable regime at the time of the resolution did not expressly entail the principle of 'no creditor worse off', enshrined in the Bank Recovery and Resolution Directive (BRRD),[67] entailed any violation of said directive or of the right to property enshrined in the Charter.

Bail-in powers have given rise to constitutional litigation in domestic courts and the European Court of Human Rights.[68] In *Pintar and Others v Slovenia*, the Strasbourg Court was confronted with Slovenian legislation implemented in the context of the Eurozone crisis that resulted in the bailing-in of shareholders and bondholders of banks. In the proceedings, the Slovenian Constitutional Court had already found unconstitutional breaches in the legislation, following the CJEU ruling in *Kotnik and others*.[69] The Court found that the domestic legislation governing how shareholders and bondholders bring claims for unlawful takings of property failed to provide a legal avenue to effectively challenge the lawfulness of the alleged breach of the right to property.

Moreover, there are scholarly works emerging that accuse the BRRD and the bail-in provisions of breaching the right to property of bank creditors and,

[67] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014, establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council).

[68] See Kern Alexander, 'Bank of Slovenia's Bail-in Powers Come Under Constitutional Scrutiny by the Strasbourg Court', *EU Law Live*, 11 October 2021 (accessed 15 August 2022).

[69] Case C-526/14 *Kotnik and others* EU:C:2016:570.

therefore, presenting a legal risk to resolution authorities in Member States. Therefore, in *BPC Lux 2*, the CJEU had every interest in taking jurisdiction and having its say on the questions referred, especially considering the possibility that the conflict may end up being adjudicated by the Portuguese Constitutional Court, in concrete review proceedings. Taking jurisdiction in this case allowed the CJEU the possibility to have the first word on the interpretation of the fundamental rights' constellation at stake, particularly from the perspective of the compatibility of the legal regime at stake and, ultimately, of the 'no creditor worse off' principle with the constitutional protection of the right to property. In fact, in the analysis of the domestic legislation, the Court was able to frame as materially providing for a solution which is substantially equivalent to the mentioned principle even though that yardstick was not expressly foreseen in the statute at the time of the bank resolution. However, to claim jurisdiction, the CJEU could not simply rely on the fact that the domestic legislation aimed at transposing the BRRD. This is where the MoU comes to the fore as the jurisdictional trigger for the CJEU.

The Portuguese legal framework on recovery and resolution of credit institutions has a mixed pedigree. It was first introduced in 2012[70] and subsequently amended, for the first time, in 2014.[71] This first amendment aimed at *partially* transposing BRRD. The 2012 piece of legislation was adopted before the Commission presented the proposal for the directive which led to the BRRD, as the Advocate General highlighted in his opinion.[72] Moreover, the 2014 act transposed part, but not all, of the BRRD. So, there was the theoretical possibility that this case could fall out of the jurisdiction of the CJEU.

The safest avenue to claim jurisdiction, however, was to lean on the fact that the original regime, dating from 2012, had been approved to implement MoU conditionality, as the Portuguese Government clarified in the proceedings. According to the MoU, since its original version, the Portuguese authorities 'amend legislation concerning credit institutions' [to] 'introduce a regime for the resolution of distressed credit institutions as a going concern under official control to promote financial stability and protect depositors'.[73]

After accepting jurisdiction in this, it was not difficult for the Court to resolve and discard the alleged breach of the right to property. In the few cases where the Court accepted jurisdiction to review austerity measures, the tension between financial stability and fundamental rights has always been resolved in

[70] Decree-Law 31-A/2012, 10 February 2012.
[71] Decree-Law 114-A/2014, 1 August 2014.
[72] Parag. 26.
[73] See Memorandum of Understanding, paragraphs 2.13 and 2.14. The MoU is available at https://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf.

favour of the former.[74] This creates a stronger incentive for domestic institutions to stand up as gatekeepers of 'the rights of those who do not benefit from integration and whose voice can be structurally undermined by it'.[75]

11.4.2 *Constitutional Adjudication*[76]

The PCC became a prominent forum for litigation concerning austerity measures at the height of the Eurozone crisis. Between 2012 and 2014, several restrictive measures, directly requested by the MoU and the bailout conditionality, were checked for their compatibility with the domestic constitutional standards. On some occasions, the PCC delivered significant blows to the Government's strategy by invalidating measures based on the principle of equality, particularly in the dimension of equality of burdens concerning the financial adjustment costs, the principle of legitimate expectations, and the principle of proportionality.[77]

It struck down further pay cuts on public workers and pensioners,[78] a new framework broadening the legal basis for firing civil servants,[79] some of the amendments to the Labor Code aimed at slashing labour costs and reducing the employees' protection against unfair dismissals,[80] and permanent cuts to pensions.[81]

Whereas in the first challenges concerning pre-bailout austerity the PCC scrutiny was self-restrained and deferential,[82] when called upon to review

[74] López-Escudero, 'Judicial Protection Against Austerity Measures in the EU', in Izquierdo Sans et al. (eds.), *Fundamental Rights Challenges: Horizontal Effectiveness, Rule of Law and Margin of Appreciation* (Springer, 2021) 205.

[75] Komarék, 'The Place of Constitutional Courts in the EU', 9 *European Constitutional Law Review* (2013) 449.

[76] The work on this section is in part based on research that has been presented in earlier texts. See Violante, 'The Portuguese Constitutional Court and its Austerity Case Law', in Costa Pinto and Pequito (eds.), *Political Institutions and Democracy in Portugal: Assessing the Impact of the Eurocrisis in Portugal* (Cham: Springer, 2019) 121; Violante, 'The Eurozone Crisis and the Rise of the Portuguese Constitutional Court', 39 *Quaderni costituzionali* (2019) 208; Violante, 'Constitutional Adjudication as a Forum for Contesting Austerity: The Case of Portugal' *supra* n. 36.

[77] For a full review of the case law, see Canotilho, Violante and Lanceiro, 'Austerity Measures Under Judicial Scrutiny: The Portuguese Constitutional Case Law', 11 *European Constitutional Law Review* (2015) 155–183, and Violante and André, 'The Constitutional Performance of Austerity in Portugal' *supra*. 36.

[78] Decisions 353/2012, 187/2013, 413/2014 and 574/2014.

[79] Decision 474/2013.

[80] Decision 602/2013.

[81] Decisions 862/2013 and 575/2014.

[82] Decisions 399/2010 and 396/2011. See Teresa Violante, 'Constitutional Adjudication as a Forum for Contesting Austerity: The Case of Portugal' *supra* n. 36 175–176.

domestic measures implementing MoU conditionality the Court moved from a light level of scrutiny to a less deferential approach. On the one hand, this greater unwillingness to defer to the political branches is in line with the tendency observed in the general judicial reaction towards the Eurocrisis.[83] On the other hand, the Court justified the strengthened scrutiny with the cumulative effect of the restrictive measures, and the passage of time that created additional burdens on the domestic authorities to devise alternatives to reach fiscal stability without jeopardizing fundamental rights and the welfare system.

The primary benchmarks enforced by the PCC were the principle of 'proportional equality', in the sense that there should be an 'equal distribution of the economic burden created by austerity',[84] and the principle of legitimate expectations. Despite the detailed catalogue of welfare rights, often qualified as the longest bill of social and economic rights in a national constitution,[85] the austerity case law primarily relied on general and abstract provisions following the Court's traditional 'self-restrained', 'minimalist' and 'shy'[86] socioeconomic rights jurisprudence.

The PCC addressed austerity conflicts concerning domestic measures implementing financial assistance conditionality primarily through substantive accountability means. As the Court highlighted,[87]

> The Constitution certainly cannot remain unaware of the economic and financial reality, and in particular of a situation that can be considered to be of serious difficulty. But it has a specific normative autonomy that prevents economic or financial objectives from prevailing, without any limits, over parameters such as equality, which the Constitution defends and must enforce.

The financial impact of the decisions led to several renegotiations of the bailout programme of the MoU conditionality. The parties to the bailout agreement recognized the existence of a 'constitutional risk' to the implementation of the programme and introduced 'legal safeguards' in the MoU to mitigate 'legal risks from future potential Constitutional Court rulings'.[88]

[83] Fabbrini, *Economic Governance in Europe. Comparative Paradoxes and Constitutional Challenges* (Oxford, 2016) 100.

[84] Ribeiro, 'Judicial Activism Against Austerity in Portugal', *International Journal of Constitutional Law Blog*, Dec. 3, 2013.

[85] Magalhães, 'Explaining the Constitutionalization of Social Rights. Portuguese Hypotheses and a Cross-National Test', in Galligan and Versteeg (eds.), *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013) 433.

[86] Reis Novais, *Direitos Sociais. Teoria jurídica dos direitos sociais enquanto direitos fundamentais* (Coimbra: Almedina, 2010) 374, 380.

[87] Decision 353/2012.

[88] See the revised versions of the MoU, following the seventh, eighth, and ninth updates (June and November 2013).

The introduction of the legal safeguards did not lead to a substantial change in the Court's review. On the one hand, the level of scrutiny remained intense, and the Court later struck down some of the replacement measures. On the other, the appeal to the transnational dimension of the austerity conflicts did not induce the Court to substantially engage with EU law yardsticks. If, on the surface, the judges regularly cited EU law and international law to frame the rescue package for Portugal, such references had no substantial value, and the cases were always solved against national constitutional yardsticks.

11.4.3 *Pensions' Cuts Case Law by the ECtHR*

Some austerity cases concerning reductions in pensions found their way to the Strasbourg court, but they failed at the admissibility stage. In *Da Conceição Mateus and Santos Januário v Portugal*[89] the Court found that the cuts in the applicants' pensions were 'clearly in the public interest within the meaning'[90] of Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR) (protection of property). The Court also added that 'a wide margin of appreciation is usually allowed to the State under the Convention when it comes to general measures of economic or social policy'.[91] At a later moment, in *Silva Carvalho Rico v Portugal*,[92] the ECtHR referred to the PCC decisions of 2013 and 2014 that found the pensioners' contribution to be a proportional measure given its extraordinary and temporary nature. The Court also added that 'budgetary constraints on the implementation of social rights can be accepted as long as they are proportionate (…) and do not reduce social rights' claims to purely symbolic sums', and that the 'international recognition of the country's economic situation indicates that the present budgetary constraints constitute an imperative, which however did not reduce possessions originating in a statutory social right's claims to a level that deprives the right of its substance'.[93]

Moreover, the Court found itself incompetent to decide whether alternative measures were available, given the State's wide margin of appreciation to decide on general measures of economic and social policy.

11.5 CONCLUSIONS

The CJEU has provided a very limited forum for review of austerity measures adopted in a context of financial assistance to a euro area Member State. First,

[89] Applications ns. 62235/12 and 57725/12, Decision on Admissibility, 8 October 2013.
[90] Parag. 26.
[91] Parag. 22.
[92] Application n. 13341/14, Decision on the Admissibility 1 September 2015.
[93] Parag. 44.

the CJEU only delivered substantial review of conditionality measures at the end of the crisis, when Portugal had already exited the bailout programme and the political pressure exerted upon the national political institutions had eased.[94] Second, the initial scope of review was limited by the type of workers affected by the specific cuts reviewed in *Associação Sindicial dos Juízes Portugueses*, where the protection offered by the CJEU was narrowed to judges. By framing the case as a rule of law crisis review – and not a Eurocrisis review – the Court narrowed its accountability-rendering stage to national judges, as special public workers, subject to a certain employment relationship which renders them a specific role in the adjudication of EU law conflicts. Third, the Court was also limited in its parameter of control. The cuts were measured against Article 19(1), subparagraph two TEU to determine if the salary-reduction measures affected the principle of judicial independence. No other constitutional goods, namely the proportionality of the reductions, social rights, or solidarity,[95] were taken into account by the Court. Fourth, in *BPC Lux 2*, a case concerning the protection of rights and interests of investors and creditors of resolved institutions, and the stability of the financial system, there was no hesitancy from the Court to accept jurisdiction, which confirms the Court's more favourable orientation towards liberal rights to the detriment of social rights.

The Court thus failed to ensure full judicial protection to austerity measures concerning salary-reductions adopted in the context of a financial assistance programme to a euro area Member State as well as in the more general framework of an excessive deficit procedure. The Portuguese bailout is exemplary of the protection offered by European law against austerity measures. Individuals and companies can be sheltered in their role as investors and judges but not as workers and pensioners.

Domestic constitutional adjudication provided the only effective avenue for full substantive accountability of MoU options: national judicial fora can provide a supplement to the missing but needed accountability in substance of the EMU institutional structure.[96] Domestic constitutional courts provided adequate fora to challenge national measures implementing the MoU in what has been called the *paradox of judicialization*, in contrast to the deferential posture adopted by the US courts in economic issues.[97]

[94] The excessive deficit procedure was initiated by Council Decision 2010/288/EU of 19 January 2010 (OJ L 125, 21.5.2010), and abrogated by Council Decision (EU) 2017/1225 of 16 June 2017 (OJ L 174, 07.07.2010). Portugal had exited the financial assistance programme on 30 June 2014.

[95] As Farahat stresses in her chapter to this book. Farahat, 'Adjudicating Transnational Solidarity Conflicts: Can Courts Ban the Destructive Potential'.

[96] Introduction, p. 20.

[97] Fabbrini, *Economic Governance in Europe. Comparative Paradoxes and Constitutional Challenges* (Oxford University Press, 2016) 63 ff.

However, since the PCC failed to scrutinize the MoU, several hurdles related to the process were not reviewed, namely aspects related to the procedure leading to the approval of the bailout – which was conducted outside the parliament and by a resigning government, the fact that it was not officially translated into Portuguese and the difficulties in accessing the updated version following each revision. These aspects, which raise serious rule of law concerns, were not reviewed and there is a full absence of procedural accountability with regard to the Portuguese programme.

Furthermore, EU institutions were not held accountable by the constitutional case law: as the conflicts were fully nationalized, the 'account-giver' was limited to the domestic institutions who were reduced to a role with limited negotiating power with the creditors which raises doubts as to the likelihood of the accountability provided through domestic judicial review in the case of borrower countries. That was not the case of the *Bundesverfassungsgericht* which, in its *PSPP*[98] ruling, was able to hold accountable not only the domestic institutions (the Bundestag and the Federal Government) but also the CJEU and the European Central Bank (ECB). The German Court, however, in its Eurocrisis case law, has always assumed the transnational dimension of the conflicts under adjudication. That fact enabled it to resort to the preliminary review mechanism when it deemed appropriate – in fact, for the first time[99] after a long history of indirect judicial dialogue between the two jurisdictions. Later, when the CJEU failed to properly hold the ECB accountable for its quantitative easing policy,[100] the German Federal Constitutional Court was able to scrutinize both institutions. To do so, it activated the ultra vires review, a tool that the court had been developing since its seminal Maastricht decision.[101] Instead of the procedural and deferential scrutiny applied by the CJEU to the ECB's statement of reasons, the German Court asked for a substantive review of the *PSPP* programme to be able to effectively check whether the ECB's actions were contained within its mandate.[102]

However, taking an austerity case to Luxembourg might prove a risky strategy for the Portuguese Court. At that time, the Court had not developed yet

[98] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvR 859/15, (May 5, 2020), www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html.

[99] In the *OMT* referral decision. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvR 2728/13 (Jan. 14, 2014), www.bverfg.de/e/rs20160621_2bvr272813en.html.

[100] Case C-493/17 *Heinrich Weiss and Others* ECLI:EU:C:2018:1000.

[101] Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Oct. 12, 1993, 89 Entscheidungen Des Bundesverfassungsgerichts [BVerfGE] 155.

[102] For a detailed analysis, see Violante, 'Bring Back the Politics: The PSPP Ruling in Its Institutional Context', 21 *German Law Journal* (2020) 1045–1057.

a doctrinal framework to frame the relationship between national constitutional law and EU law, particularly in cases of conflict. Whereas its German counterpart had been building a solid dogmatic frame since the *Solange* cases, and later, in relation to the link between the democratic principle and European integration, since the *Maastricht* ruling, and had at its disposal a tripartite framework to handle the relationship between the two legal orders, the Portuguese Court only in 2020 expressly dealt with the issue of primacy of EU law over national law, including constitutional law, and still in the exclusive frame of fundamental rights' issues. In some of its austerity rulings, the Court vaguely alluded to the concept of 'constitutional identity', but, to this day, ultra vires review has never been addressed nor articulated in the case law, and it is doubtful that the judges accept it as a valid tool to check power grabs by EU institutions. Ultra vires review, as enforced by the *Bundesverfassungsgericht*, implies a substantive reading of the democratic principle that makes it one of the central normative tenets of the constitutional order, but it is not replicated in the constitutional case law of other Member States.

The nationalization of the conflict by the Constitutional Court also explains why the case law was unable to substantively contest the overarching choices of the financial assistance programme implementing a regressive economic policy: not only was accountability delivered through piecemeal litigation, but there were also structural limits with regards to the effects that judicial decisions can produce at the level of economic policies, particularly in the case of Portugal, where the Constitutional Court is not equipped with decisional remedies able to address systemic and structural failures.[103]

The lessons provided by the Eurocrisis show that domestic constitutional law can provide an avenue for legal accountability of financial assistance. A future financial assistance programme would be granted in the framework of the ESM, which still has not been brought into the fabric of EU law.[104] Given its intergovernmental nature, review of conditionality would not be problematic to the PCC, as it acknowledged in relation to the nature of the Fiscal Stability Treaty.[105] Conditionality has, in the meantime, expanded its influence on other policy areas such as EU funds.[106]

[103] Roach, *Remedies for Human Rights Violations. A Two-Track Approach to Supra-National and National Law* (Cambridge University Press, 2021) 408 ff.

[104] On the process of reforming the ESM, see Markakis, 'The Reform of the European Stability Mechanism: Process, Substance, and the Pandemic', 4 *Legal Issues of Economic Integration* (2020) 350–338.

[105] Decisions 574/2015 and 575/2015.

[106] On the rise of conditionality in EU law, see Baraggia and Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges', 23 *German Law Journal* (2022) 131–156.

Moreover, the Constitutional Court has been incrementally developing a doctrinal toolbox to address the relationship between domestic constitutional and EU law.[107] Although the PCC has expressly outlined the constitutional principle of friendliness towards EU integration, it has reserved the right to have the last word on the constitutional limits of the applicability of Union law on the Portuguese legal order. Should the EU standard of protection of fundamental rights fail to provide equivalent protection, in systemic terms, to the one delivered by the national Constitution, the Court may agree to review EU law or to strike down domestic legislation within the scope of EU law. Given the dominant perception of the EU judges that economic emergency and financial stability justifies the abridgement of social and economic rights, and a potential new crisis in the euro area, new lines of tension will possibly emerge in the future.

[107] Decisions 422/2020 and 382/2022.

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